IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner,*

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 128-137) is reported in 122 F. (2d) 73. It is not yet reported in the District of Columbia Appeals Reports. The opinion of the District Court (R. 6) is not reported.

STATEMENT OF JURISDICTION.

Jurisdiction is conferred under Sec. 240 (a) of the Judicial Code, Act of February 13, 1925 c. 229, 43 Stat. 938. A writ of certiorari was granted (R. 139) upon the petition filed September 26, 1941, to review the judgment of the Court of Appeals rendered on July 28, 1941 (R. 137-138). The decision of the Court below is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Peterson* v. *United States*, 119 F. (2d) 145, holding that work of a character similar to this was public work of the United States within the meaning of the Miller Act. The Court below failed to apply properly the rule laid down in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, holding that the contract terms imposed by contracting officers on behalf of the United States were not subject to judicial supervision. The case further turns about the construction of a Federal statute, the Miller Act, 40 U. S. C. A. 270 a, b, c, Act of August 24, 1935, c. 642, 49 Stat. 793. (*infra*, 20-22, Appendix)

STATEMENT OF THE CASE.

The United States, acting through the Secretary of the Interior, entered into a contract with the respondents, Irwin & Leighton, for the construction of a Library Building at the Howard University in the District of Columbia (R. 1-3). The cost of the work was $817,225 (R. 13). The Howard University owned the land upon which the building was erected (R. 109-110).

The building was constructed with moneys of the United States allocated by the President of the United States under authority of the National Industrial Recovery Act (R. 99) As a condition of the contract the Secretary required Irwin & Leighton as principals to give to the United States two bonds each in the penal sum of $408,612 and upon which the United States Guarantee Company was surety. One of the bonds was conditioned for the prompt payment to all persons supplying labor and material in the prosecution of the work (R. 20-21). The other was conditioned for the per-

formance of the contract (R. 22-23). The surety's premium charge for the bonds was $8,172.25 (R. 23).

The petitioner and several other persons who have claims in suits now pending in the District Court furnished material for use and which was used in the work and for which they have not been paid. They accordingly instituted suits upon the labor and material bond (R. 1-3) in conformity with the requirements of the Miller Act (*infra* 21, Appendix).

The respondents moved to dismiss the complaint upon the ground that the work to which the materials were furnished was not a public work of the United States (R. 3-4). The District Court heard the motion as a motion for summary judgment and denied it in a memorandum opinion, holding that petitioner was entitled to recover on the bond (R. 6), and entered an order accordingly (R. 6-7). The United States Court of Appeals allowed a special appeal (R. 8-9) and reversed the order of the District Court.

The Howard University is a private corporation chartered by an act of Congress and amendments thereto (R. 122-126, 107). Its sole purpose is for the education of youth in the liberal arts and sciences (R. 123) and it is prohibited by its charter from employing its funds or income or any part thereof for any purpose or object other than this (R. 125). Its charter is subject to alteration, amendment or repeal by the Congress (R. 125, Act of March 2, 1867, 14 Stat. L. 438). A revision of the charter made by Act of Congress of December 13, 1928 (45 Stat. 1021, 20 U. S. C. A. 123), authorizes annual appropriations by the United States to aid in the construction, development and maintenance of the University, further providing that the University shall be at all times open to inspection by the United States Bureau of Education and shall be inspected by the Bureau at least once a year. The same act also requires that an annual report making a full exhibit of the affairs of the University shall be presented to the Congress each year in the report of the Bureau of Education (R. 125-126). The Act of July 1, 1898, c. 546, (30 Stat. 624, 20 U. S. C. A. 122), requires the Presi-

dent and Directors of the University to report to the Secretary of the Interior the condition of the institution on the first day of July each year, embracing therein the number of pupils received and discharged or leaving for any cause during the preceding year and the number remaining; also the branches of knowledge and industry taught and the progress made therein, "together with a statement showing the receipts of the institution and from what sources, and its disbursements, and for what objects". The Act of March 3, 1899, c. 424, (30 Stat. 1110, 20 U. S. C. A. 122), provides that no part of the appropriations made by the Congress for the University should be used directly or indirectly for the support of the theological department or any sectarian denomination or religious instruction, and further that no part of the appropriations should be paid to the University until it should accord to the Secretary of the Interior authority to control and supervise the expenditures of all moneys paid under the appropriations.

The University enjoys the favor of the Federal Government to an extent almost without parallel. The budget of the University for a normal year is about $1,100,000 covering administration, instruction, maintenance and operation of the plant, including the boarding department. Annual contributions from the Federal Government toward this budget for the years 1935, 1936 and 1937 were about $675,000 a year (R. 109). In addition to this the United States spent $3,503,399.58 between 1933 and 1937 for buildings at the University (R. 122, 118-119). Only one building was built at the University in the thirty years preceding 1940 from funds obtained from other sources, and for that building $105,000 was contributed privately and $25,000 appropriated by the United States (R. 121).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that the Library Building was not public work of the United States within the meaning of the Miller Act.

(2) In undertaking to review the authority of the contracting officer of the United States to take the bond here sued upon.

(3) In denying the inherent authority of the contracting officer to take this bond as an incident of his power to contract on behalf of the United States.

(4) In denying the petitioner a right of recovery upon the bond as upon a private obligation for the benefit of a third party.

ARGUMENT.

Summary.

1. The argument is based principally upon the proposition that work of this character is public work of the United States within the meaning of the Miller Act and an analysis of the facts is made in this light. It is in this field that the opinion of the Court of Appeals conflicts with the decision in *Peterson* v. *United States*, 119 F. (2d) 145.

2. It is further contended that the taking of the bond involved in this case was a function of the administrative branch of the Government. The requirement that the contractor furnish such a bond was well within the necessarily inherent power of the executive branch of the Government whether specifically authorized by statute or not.

3. The bond is a complete instrument in itself and as such is fully adequate to support an action as upon a private obligation. The fact that this complaint was cast in conformity with the procedural requirements of the Miller Act should not form a bar to a recovery by the beneficiaries.

4. A brief discussion of points contained in the opinion of the Court of Appeals, and not otherwise covered, forms the fourth section of the argument.

I. This Work is Public Work.

It will be observed that the Miller Act refers to "* * * any contract * * * for the construction, alteration or repair of any public building or public work of the United States * * *" (*infra* 20; Appendix). Hence it will be seen that the statute applies to any contract for the construction of any public work of the United States. It should be observed at the beginning that there may be a distinction between the term "public works" and the term "public work". The "public works" are ordinarily those more or less monumental edifices which are erected for the principal business of the state and stand to endure for time as an evidence of the achievement of the political body. There is on the other hand much necessary business of the Government which is relatively trivial in character but which is performed under contract. The product of this class of contracts would not be ordinarily associated with the buildings, fortifications and the like, which are usually thought of as constituting the "public works" of the United States. They are, however, work of the public and do fall within the broadly inclusive term "public work" as must all work of the state whether done under contract or otherwise. It was the intention of the statute to require bonds of the kind given here for every such contract exceeding $2,000 in amount. The monetary limitation is a positive indication that the Congress had intended to exempt only such contracts as were so small in amount that the likelihood of loss would scarcely warrant the formality of the bonds.

There is nothing in the ordinary meaning of the term which would exclude the work done in this case from the benefits of the statute.

> "Public works. All fixed works constructed or built for public use or enjoyment, as railroads, docks, canals, etc., or constructed with public funds and owned by the public; often specif., such works as constitute public improvements, as parks, museums, etc., as distinguished from those involved in the ordinary administration of the affairs of a community, as grading of roads, lighting of streets, etc."
>
> Webster's International Dictionary
> Second Edition.

Undoubtedly the absence of a lien right upon property owned by the United States motivated the passage of the labor and materialman's bond statutes, *Title Guaranty & Trust Co.* v. *Crane*, 219 U. S. 24. But rights arising under the bonds have never been held to be limited to the lien rights given in the various states, and go far beyond them. The bond affords protection to persons who have no direct contractual relation with the contractor, that is, subcontractors, under subcontractors. *U. S.* v. *American Surety Company*, 200 U. S. 197. The lien law of the District of Columbia does not extend that far, *Leitch* v. *The Central Dispensary & Emergency Hospital*, 6 App. D. C. 247, and this has not been changed, *Lipscomb* v. *Hough*, 52 App. D. C. 313, 286 F. 775.

The Court of Appeals turned its decision (R. 128-137) upon the ownership of the land rather than upon the character of the work. The pivot of the decision is set out more fully in the earlier case of *Maiatico Construction Co.* v. *United States*, 65 App. D. C. 62, 79 F. (2d) 418. There the character of the Howard University and its status as an educational institution was reviewed at great length. But the real question is whether the work, that is, the construction of this building by the United States, is "public work". In other words, was the procuring of the contract and the

expenditure of the funds under it, which in turn created the building, a work of the United States? The question is not whether the completed structure constituted one of the "public works" of the United States after its keys were presented to the University, nor does the case turn upon the question of whether the University is a public, private or quasi public institution. If the expenditure of the public moneys and the construction of the building, which are together a single transaction, represent a proper constitutional exercise of power by the United States, then the work is public work.

In *Peterson* v. *United States*, 119 F. (2d) 145 (C. C. A. 6th) the United States had entered into an arrangement with a Water Conservancy District for the improvement of the flood control, water conservation and navigation of certain rivers in Ohio. Funds were to be made available by the United States from the same Public Works funds which furnished the contract price for the Howard University work. The Conservancy District was organized under Ohio law. The proposed improvements necessitated the relocation of the roadbed of the Pennsylvania Railroad Company. To accomplish this end the United States entered into a contract with Peterson, a contractor, for the construction of a tunnel upon land which was not owned by the Federal Government but which was owned either by the Conservancy District or the Railroad Company. In connection with the contract the United States required a bond conditioned for payment to persons furnishing material under the Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278, 40 U. S. C. A. 270, as mended), and for which the Miller Act is a substitute. *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15. Persons who furnished material in the Peterson case brought suit upon the bond which the United States had taken. The defense was raised that since the United States did not own the land upon which the tunnel was built, the work was not public work. The Court, in sustaining the validity of the bond, said:

"The term 'public work' as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. 'Public work' as used in the Act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. Undoubtedly the work of flood control and the promotion of commerce among the states, by the improvement of rivers and harbors, is public so far as it promotes a public object. From the standpoint that it promotes the benefit of a privately owned railroad, it is in a sense, private, but nonetheless public, although incidentally promoting private advantage.

* * * * * * *

"The case of Title Guaranty & Trust Company v. Crane Company, 219 U. S. 24, 35, 31 S. Ct. 140, 55 L. Ed. 72, so strongly relied on by appellants, is without point. In that case, the court was considering the applicability of the statute to a contract, to secure which the bond was given, for the construction and delivery of a single screw wooden steamer for the United States. The surety there was attempting to confine the phrase 'public work' to structures of permanent nature attached to the soil which was its then understood meaning. The Supreme Court extended the phrase to cover any class of property belonging to the representative of the public whether or not attached to the soil. There is nothing in the opinion from which an inference may be drawn that ownership was the sole criterion. To so circumscribe the act would destroy its purpose. Many of the public works of the United States are on property which the United States is using temporarily. The case of Maiatico Construction Company v. United States, 65 App. D. C. 62, 79 F. (2d) 418, also relied on by appellants, has no application. In that case, the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the property and the school was not for public use, although it may have been remotely for public benefit.

"In recent years, enormous expenditures for public works have been made partly for the projects them-

selves as in the case at bar, but mostly to reduce unemployment and to stimulate business. However, there is no reason why mechanics, laborers and materialmen who do work, or furnish supplies on such projects as fall within the purview of the statute in question, should not have its benefits. In our opinion, the present improvements were 'public work' within the meaning of the act, and the bond, the subject of this action, a valid and enforceable obligation." Peterson v. U. S., 119 F. (2d) 145.

There can be no distinction between the principle involved in the Peterson case and the present case, except that the present case may be fairly said to be even clearer than the Peterson case. The work in the Peterson case was to be turned over to a public service corporation operated for the profit of its shareholders. The tunnel was a facility in the public service which the corporation rendered and from which it should reasonably expect to derive some profit. In the present case the corporation is not only a creature of the Congress subject to such change as the Congress might from time to time wish to make under the reservation contained in the charter, but it is organized solely for public service without profit. The service which it renders, the education of youth, is one of the vital concerns of the state. It is a service which is largely rendered by the state through the high school age. It may be noticed that in many of the states, state universities engage in similar work under public authority.

It would be startling to say that the education of youth is a proper governmental function through the high school or preparatory school but unconstitutional after that. Unquestionably the expenditure of the funds of the United States for the improvement of the Howard University and the assumption of the major portion of the financial burden of the operation of the University, are proper exercises of constitutional power.

"Argument that the lending functions of the Federal Land Banks are proprietary rather than governmental

> misconceives the nature of the Federal Government with respect to every function which it performs. The Federal Government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. N. Y., 306 U. S. 466, 477, 83 L. ed. 927, 931; 59 Sup. Ct. 595, 120 A. L. R. 114". *Federal Land Bank v. Bismarck Lumber Co.* (decided November 10, 1941), Law Ed. Advance Opinions Vol. 86, No. 1, p. 46.

Particularly would this be true in the District of Columbia, the government which is constitutionally entrusted to the Congress. Constitution, Article I, Section 8, Clause 17, *Capital Traction Co.* v. *Hof*, 174 U. S. 1. The use of moneys of the United States for the fostering and improvement of education in the District of Columbia cannot be seriously open to legal challenge.

The Miller Act here involved was passed on August 24, 1935. At the time of its passage there stood upon the statute books the National Industrial Recovery Act of June 16, 1933 (*infra* 22-25, Appendix), under which an appropriation of three billion three hundred million dollars had been made by the Congress for use as the President and Administrator of Public Works should determine under the authority delegated in the statute. Among the public works authorized by the statute were "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public: * * *". (Sec. 402 c, *infra* 23, Appendix). The work undertaken in this case was of that character, for similar work had been done before (R. 114-121), *Maiatico Construction Co.* v. *United States*, *supra*. The District Court held that the Miller Act must be read in the light of the language of the previously enacted Industrial Recovery Act and that since this work was authorized by the general enactment in 1933 setting up the Public Works Program, it must be concluded that the Miller Act in 1935 contemplated that these works were also to be covered into the bond statute (R. 6). In the hearing before the sub-

committee of the Judiciary Committee of the House of Representatives considering the passage of the Miller Act it was remarked by one of the members, Congressman Duffy:

> "If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance." (R. 73)

II. The Action of the Secretary in Taking the Bond is Not Subject to Judicial Review.

The Court of Appeals held that since the ownership of the land where this work was done was vested in the Howard University rather than in the United States, the work was not public work within the historically accepted meaning of that term and that as a result the Secretary of the Interior was in error in so considering it and in taking a bond under the Miller Act. The Miller Act is in substance a statutory direction to contracting officers of the United States requiring them to take such bonds along with bonds to secure the performance of the contracts which they make, where the contracts are for public work of the United States. If the executive branch fails to take the bond then the material furnisher is without remedy. The right springs primarily from the contractual terms of the bond rather than from the statute. *Babcock & Wilcox* v. *American Surety Co.*, 236 F. 340; *U. S.* v. *Stewart*, 288 F. 187; *U. S.* v. *Starr*, 20 F. (2d) 803.

The conclusion which the Court of Appeals reached is contrary to the decision of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. It was there decided that the action of a contracting officer in carrying out a statutory direction of the Congress as to the terms upon which public contracts are to be made is not subject to judicial review. Such statutory provisions are in substance the directions of a principal to an agent, and if erroneously construed by the agent, are to be corrected by the principal, that is, the Congress, and not by the courts. In the *Lukens Steel Co.* case it was held here that an interpretation of such a statute made by an administrative officer was not

subject to the injunctive order of the courts at the instance of prospective bidders. And this was true even though the interpretation appeared to be contrary to the historical concept of the terms used in it. In the *Lukens* case the judicial review was sought prior to the making of the contract. In the present case the contract was made, the bond given, and now the contractors deny its validity. "If the decision of the Court below is correct, the effect of the decision in the *Lukens* case would seem to be nullified, for the contractor may avoid any procedural difficulty by omitting to question the validity of the contract or bond beforehand, but entering into it, refuse with impunity to perform the obligations assumed.

It is held in the *Lukens* case that the terms and conditions upon which the Government enters into contracts are exclusively matters for administrative determination, subject to such direction as may be given by the Congress. Determination of conditions upon which public contracts are to be let is not a part of the judicial function. From this it may be concluded that the requirements set up by contracting officers are not subject to judicial veto whether it is sought before the contract is made or afterward.

The Department of the Interior had occasion to consider the same question which is involved here. Its view is found in the memorandum of its Solicitor (R. 23-25). He concluded that a bond to secure the payment to furnishers of labor and material might be properly required by the Department under the regulatory power delegated to the Administrator of Public Works by the President, pursuant to the Industrial Recovery Act. This was done by an Executive Order of the President No. 6929 (*infra* 26, Appendix). The authority was exercised by the Administrator in his Bulletin No. 51 (R. 26-28, 101), governing contracts for "Federal projects." This was a Federal project (R. 103-104). The Administrator requires these bonds in all cases where the contract is made by the United States (R. 96-104). The Department apparently continues to take these bonds.

III. The Bond Should Be Enforced Whether Within or Without the Confines of the Miller Act.

The bond upon which this suit was brought (R. 20-21) is fully enforcible as a private obligation upon the terms within the four corners of the instrument. It is a simple covenant requiring payment for all labor and material furnished to the work. Undoubtedly the Secretary as a contracting officer of the Government had inherent authority to require such a bond as a condition of the contract. Bonds for the protection of the United States had been exacted before the statutory requirement was passed. *U. S.* v. *National Surety Co.*, 92 F. 549. If it were desired to extend the obligation of the bond to protect furnishers of labor and material, undoubtedly the power to do so rests in the executive branch of the Government, although there may have been hesitation to exercise it without a specific authorization from the Congress, especially since the notion of using such bonds was a novelty in 1894, when the Heard Act was passed. It would seem inescapable that the authority to make a contract on behalf of the United States carries with it by a necessary implication the authority to provide for all matters incidental to it. The requirement by the contracting officer of such a bond as given here, even without express statutory direction, is no more than the exercise of an implied authority. The Court below seemed to doubt the authority of the officer to take such a bond outside of the statute, although it had been conceded before. *Maiatico Construction Co.* v. *U. S.*, 65 App. D. C. 62, 68, 79 F. (2d) 418, 424.

While the Miller Act compels contracting officers to take such bonds in all cases coming within its terms, Sec. 270a (c) of the statute is an affirmative recognition of the authority necessarily resting in the contracting officer to take bonds in cases other than those specifically enumerated.

> "(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to

those or in cases other than the cases specified in subsection (a) of this section." (*Infra* 21, Appendix)

The requirement of a bond for the payment of labor and material furnished to the work is a mere incident of a building contract and such bonds are used in private business with increasing frequency. *McClare* v. *Massachusetts Bonding & Insurance Co.*, 266 N. Y. 371, 195 N. E. 129; *Aetna* v. *Big Rock*, 180 Ark. 1, 20 S. W. (2d) 180; *Byram* v. *Page*, 109 Conn. 256, 146 Atl. 293. An elaborate discussion of the subject is found in 77 A. L. R. 53. The right of recovery by third party beneficiary upon such a sealed instrument had been previously recognized in the District of Columbia in *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434.

The printed bond form carries at its head a reference to the Miller Act, although no such reference is contained in its provisions. The Court below took the view that if the bond were intended by the contracting officer to represent a compliance with the requirement of the statute and it did not in fact come within the express terms of the statute, it could be given no recognition as representing an exercise of authority inherent in the officer without regard to the statute. It is submitted that this view is untenable and that the inquiry should not be directed so much to the particular source of the contracting officer's authority as to the question of whether he had any such authority from any source. If he did have the authority at all, then his action in making the contract should be sustained.

It must be pointed out that the effect of the decision below is not only to strike down the payment bond in suit here, but also to strike down the bond which the Secretary took to protect the United States against the consequence of the respondents' default under the contract. (R. 22-23) Both bonds were taken under the same circumstances. The respondents were actually charged $8,172.25 as a premium for the two bonds (R. 23), and presumably this item is reflected in the contract price which the United States

paid for the work. *Mason & Hanger Co.* v. *United States*, 56 C. Cls. 238, affirmed 260 U. S. 327.

The Court of Appeals in denying the petitioner's argument that the action might be maintained as upon a private obligation, did so in part upon the ground that the complaint was brought in the name of the United States and otherwise conformed to the procedural requirements of the Miller Act. But all of the facts necessary to sustain the action as upon a private obligation are set out in the complaint. The petitioner had but little choice to proceed as it did, since the time of suit is so limited under the Miller Act that the questions raised here could not have been determined within the allotted year beyond which the suits may not be brought. Such an objection is procedural only and the new rules are sufficiently elastic as to permit amendment by striking out the United States as the nominal plaintiff. It was because of objections of this kind that much of the changed procedure in the new rules was devised. It is submitted that the objection directed to the form in which the suit was brought is not of sufficient consequence to bar the petitioner's recovery.

IV. The Court of Appeals Decision.

There are a number of independent statements in the opinion of the Court of Appeals which should be briefly mentioned.

It was commented that the contractors had paid all their subcontractors in full (R. 130). This is doubtless an oversight, since the record is silent on this point.

While the conclusion is reached in the opinion of the Court below that "* * * the fact is that in the case we are considering the Secretary overlooked the fact that the Howard University is a private corporation * * *", it is hardly sustained by the record which shows the considered opinion of the Solicitor of the Interior Department advising that bonds were required under a similar contract for work at the Howard University (R. 23-25). At another point the

court remarked that the suit was brought against a non-resident surety, the intimation being that this was an obstacle to recovery. No such objection was raised by the respondents, doubtless because the surety, in order to qualify itself to do business in the District of Columbia, maintains a process agent for service of papers upon it in the District. This point, not being raised *in limine*, is waived, Federal Rules of Civil Procedure, Rule 12, b, h.

The suggestion in the opinion that the buildings of the University are subject to the operation of the mechanics lien statutes of the District is without force. Those statutes, like most mechanic lien statutes, provide a means whereby the claimant may impound the contract funds in the hands of the owner. Code of the District of Columbia, Title 25, Chap. 11, Sec. 351-356; Act of March 3, 1901, 31 Stat. 1384, c. 854, Sec. 1237-1242. The whole argument of the respondents is that the United States are not the *owner*. It follows that there never were and never would be any funds in the hands of the *owner* subject to the operation of the lien statutes. The funds remain in the possession of the United States until paid over to the contractors under the terms of the contract (R. 15-16). The furnishers of labor and material are without the slightest protection from the lien statutes, and if the respondents prevail, without any of the collateral protection ordinarily afforded to subcontractors and supplymen under building contracts.

The Court below has taken a narrow and historical view of the statute as outlined in the *Maiatico* case, *supra*. From such a view it would necessarily follow that the meaning of the statute was crystallized and its limitation fixed at the time of its enactment. On the contrary the statute is a direction to the administrative branch of the Government as to a condition to be fulfilled on the making of contracts for public work. It is as elastic as the activity of the Government and is broad enough to follow these activities to every field into which they may go.

It has been repeated here many times that the Miller Act and the preceding Heard Act are to be liberally construed

to effect the beneficent purpose for which they were enacted.

> "In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally. * * * 'Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.' Illinois Surety Co. vs. John Davis Co., 244 U. S. 376, 61 L. ed. 1206, 37 Sup. Ct. 614, supra. The same principle should govern the application of the Miller Act." Fleisher Engineering & Construction Co. vs. U. S., 311 U. S. 15.

It was said in reference to the Heard Act in a case allowing recovery for rental of cars and equipment and the expense of unloading freight, that:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act." Illinois Surety Co. vs. John Davis Co., 244 U. S. 376.

CONCLUSION.

The work here involved is "public work" within the meaning of the statute as interpreted both by the Court of Appeals for the Sixth Circuit in the *Peterson* case, *supra*, and by the District Court in this case. The result of the decision of the Court below will be that the United States in spending their own money to erect a building may not require the contractor to see to the payment for labor and materials used in it and may not take a bond to safeguard themselves against the contractor's failure to complete, even in face of the express recognition contained in Section 270 a (c) of the Miller Act recognizing the authority of the contracting officer to require just such protection in cases other than those specifically enumerated in the statute. The denial by the respondents of liability under their bond expressly requiring them to pay for labor and material used

in their work is singularly lacking in good conscience, after the contract and its benefits had been procured by them upon the strength of their compliance with this requirement of the Department. It is submitted that the decision of the Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully,

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APPENDIX.

The Miller Act, 40 U. S. C. A. 270 (a), (b), (c).

"270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS; RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS.

* * * * * * * * * *

"270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, par. 1, 49 Stat. 793)."

"270b. SAME; RIGHTS OF PERSONS FURNISHING LABOR OR MATERIAL.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in con-

troversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug. 24, 1935, c. 642, par. 2, 49 Stat. 794)."

"270c. SAME; RIGHT OF PERSON FURNISHING LABOR OR MATERIAL TO COPY OF BOND

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. (Aug. 24, 1935, c. 642, par. 3, 49 Stat. 794)."

The National Industrial Recovery Act, Title 40 United States Code: 401, 402, 407, 409, 411.

"401. FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; CREATION; OFFICERS AND EMPLOYEES; EXEMPTION FROM CIVIL SERVICE LAWS AND CLASSIFICATION ACT; DURATION OF LAW

(a) To effectuate the purposes of this chapter, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the 'Administrator'), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and with the consent of the State, such State and local officers and employees as he may find necessary, to

prescribe their authorities, duties, responsibilities, and tenure, and, without regard to chapter 13 of Title 5, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this chapter to such officers, agents, and employees as he may designate or appoint. * * * (June 16, 1933, c. 90, Title II, par. 201, 48 Stat. 200).

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402. PROGRAM OF PUBLIC WORKS; PREPARATION AND CONTENTS.

The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and parkways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed; Provided, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 605b of Title 15, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the opera-

tion of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft at a technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate; *Provided, however,* That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units; *Provided further,* That this chapter shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and or executive officer. (June 16, 1933, c. 90, Title II, par. 202, 48 Stat. 201);

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407. Assignments by Contractors; Approval; Application of Funds; Penalties.

(a) For the purpose of expediting the actual construction of public works contemplated by this chapter and to provide a means of financial assistance to persons under contract with the United States to perform such construction, the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, of his claim against the United States, or any part of such claim, under such contract; and any assignment so approved shall be valid for all purposes, notwithstanding the provisions of section 15 of Title 41 and section 203 of Title 31.

(b) The funds received by a contractor under any advances made in consideration of any such assignment are hereby declared to be trust funds in the hands of such con-

tractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men in connection with the project, to the payment of premiums on the penal bond or bonds, and premiums accruing during the construction of such project on insurance policies taken in connection therewith. Any contractor and any officer, director, or agent of any such contractor, who applies, or consents to the application of, such funds for any other purpose and fails to pay any claim or premium hereinbefore mentioned, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) Nothing in this section shall be considered as imposing upon the assignee any obligation to see to the proper application of the funds advanced by the assignee in consideration of such assignment. (June 16, 1933, c. 90, Title II, par. 207, 48 Stat. 205).

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409. Rules and Regulations; Penalty for Violation

The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both. (June 16, 1933, c. 90, Title II, par. 209, 48 Stat. 206).

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411. Appropriation

For the purposes of this chapter there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. The President is authorized to allocate so much of said sum, not in excess of $100,000,000, as he may determine to be necessary for expenditures in carrying out section 601 to 613 of Title 7, and the purposes, powers, and functions heretofore and hereafter conferred upon the Farm Credit Administration. (June 16, 1933, c. 90, Title II, par. 220, 48 Stat. 210).

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Executive Order of the President No. 6929.

"DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the 'Act'), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

* * * * * * * * * *

2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me. (Promulgated Dec. 26, 1934)

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